* **HIGH COURT OF DELHI : NEW DELHI**

\+ **ITA No. 656 of 2006**

Judgment reserved on: April 25, 2007

% Judgment delivered on: May 02, 2007

Commissioner of Income Tax (Central)
New Delhi ...Appellant

Through Mr. R.D. Jolly with
Ms. Sonia Mathur, Advs.

Versus

M/s Sarb Consulate Marine Products Pvt. Ltd.
L-25A, Connaught Circus
New Delhi ...Respondent

Through Mr. C.S. Aggarwal, Sr. Advocate
with Mr. Prakash Kumar, Adv.

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MADAN B. LOKUR, J.

The Revenue is aggrieved by an order dated 31st August, 2005 passed by the Income Tax Appellate Tribunal, Delhi Bench "E", New Delhi (the Tribunal) in IT (SS) A No.102/Del/1998 relevant for the block period 1987-88 to 1997-98 (upto 6th November, 1996).

2. The assessee carries on fishing activities in the high seas and it appears that on the basis of some information available with the Revenue, a search operation in respect of the assessee was conducted under Section 132 of the Income Tax Act, 1961 (the Act) on 6th November, 1996. During the search operation, some documents were seized and some fishing vessels/trawlers belonging to the assessee were searched and a restraint order under Section 132(3) of the Act was passed in respect of those vessels and served upon the concerned persons.

3. The restraint order under Section 132(3) of the Act was extended on 30th March, 1997 upto 30th September, 1997 when no further orders were passed.

4. On 16th December, 1997 a notice was issued to the assessee under Section 156BC of the Act to file a return for the block period 1.4.1986 to 6.11.1996. The return was filed by the assessee on 15th September, 1998 and an assessment order was made on 30th September, 1998.

5. In the meanwhile, a further search was conducted on the fishing vessels/trawlers on 14th September, 1998. There was no seizure but a panchnama was drawn up.

6. The Assistant Commissioner of Income Tax, in his assessment order dated 30th September, 1998 levied tax on the assessee against which an appeal was filed before the Tribunal. In the appellate forum, the assessee raised an additional ground, which was permitted by the Tribunal, to the effect that the assessment order passed on 30th September, 1998 is without jurisdiction being barred by limitation as provided under Section 158BE of the Act. This contention was accepted by the Tribunal and it was held that the assessment order was invalid with the result that the appeal filed by the assessee was allowed.

7. Being aggrieved, the Revenue has filed this appeal under Section 260A of the Act seeking the framing of some substantial questions of law. In our opinion, no substantial question of law arises for consideration since the issues raised are no longer ***res integra***.

8. The principal question that arises for consideration is whether the last panchnama was drawn on 6th November, 1996 when certain documents were seized by the Revenue and a restraint order was passed in respect of the fishing vessels/trawlers under Section 132(3) of the Act or whether the search and seizure operations concluded when a panchnama was drawn up on 14th September, 1998. According to the assessee, all proceedings concluded on 6th November, 1996 and the proceedings on 14th September, 1998 were an eyewash intended only to extend the period of limitation. The Revenue, of course, justifies the drawing up of the panchnama on 14th September, 1998 and canvassed that the period of limitation be calculated from that date.

9. We find that on 6th November, 1996 some documents of the assessee were seized and a panchnama drawn up on the same day after

an inventory was made. On the same day, three trawlers belonging to the assessee were subject to a restraint order under Section 132(3) of the Act. Thereafter, absolutely no search or seizure took place in respect of the assessee for more than one year and ten months. Eventually, on 14th September, 1998 the search was completed and we have on record a letter dated 15th September, 1998 issued by the Assistant Director of Income Tax (Investigation), Belgaum to the Assistant Director of Income Tax (Investigation), New Delhi in respect of the completion of search. The opening sentences of this letter read as follows:-

> "The search in the above group case was completed by me on 14-09-1998 as required by you. The completion of search was mere formality as there were no PO in existence."

10. It is quite clear, on a reading of this letter, that what the Revenue has done is to carry out some kind of a dummy search on 14th September, 1998 even though there was no restraint order in respect of the fishing trawlers and the dummy search was conducted by way of a formality so as to extend the period of limitation for drawing up an assessment order. Is this permissible?

11. In ***Dr. C. Balakrishnan Nair v. Commissioner of Income-***

tax, [1999] 237 ITR 70, the Kerala High Court observed that the search in that case was discontinued on 27th October, 1995 and resumed only on 10th November, 1995. There was no cogent reason for the gap of fourteen days and neither the Code of Criminal Procedure, 1973 nor the Act nor the Income Tax Rules permitted the postponement of a search for such a long period. Keeping the affected parties in a state of suspended animation about the probable continuation of search would be agonising. It was held that there must be some convincing reason for not resuming the search immediately and absent such convincing reasons, it was held that the second search was not legal or valid.

12. Similarly, in ***Commissioner of Income-tax v. Mrs. Sandhya P. Naik, [2002] 253 ITR 534***, it was held by the Bombay High Court that simply stating in the panchnama that the search is temporarily suspended does not entitle the authorised officer to keep the search proceedings alive by passing a restraint order under Section 132(3) of the Act. In arriving at this conclusion, the Bombay High Court placed reliance upon ***Sriram Jaiswal v. Union of India, [1989] 176 ITR 261*** decided by the Allahabad High Court.

13. A general consensus appears to have emerged among the High Courts to the effect that a search under Section 132 of the Act should be continuous and if it is discontinued and thereafter resumed, then there must be a valid explanation for the gap. In so far as the present is concerned, the facts on record show that prima facie there was absolutely no justification for keeping the search pending for more than one year and ten months without any semblance of any activity by the Revenue.

14. By way of justification for the hiatus, we were told by learned counsel for the Revenue that there was a transfer of jurisdiction in respect of some officers and enquiries were required to be made in respect of the assets of the assessee and that is what resulted in the break. These reasons are worth nothing for prolonging the search and seizure operation for such a long period of time. The absence of any cogent or valid explanation given by the Revenue for postponing the search from 6th November, 1996 to 14th September, 1998 makes the proceedings of the latter date completely unwarranted.

15. To this must be added the fact that the letter dated 15th September, 1998 sent by the Assistant Director of Income Tax (Investigation), Belgaum to the Assistant Director of Income Tax (Investigation), New Delhi clinches the issue. It has been categorically stated in the letter that the search conducted was a mere formality since there was no prohibitory order in existence. The unarticulated suggestion in this letter is that the Revenue carried out the search on 14th September, 1998 merely to extend the period of limitation and not because it was necessary to conduct a search for making any recovery or seizure. We agree with the conclusion of the Tribunal that this letter clearly suggests that the search and seizure operation had come to an end on 6th November, 1996 and that on 14th September, 1998 there was no restraint order in respect of the fishing trawlers of the assessee and, therefore, the search and panchnama drawn on 14th September, 1998 were not in accordance with law.

16. This being the position, it cannot be said that the last panchnama drawn up in respect of the search and seizure operation pertaining to the assessee, in terms of Explanation 2 to Section 158BE

of the Act, was drawn up on 14th September, 1998 – it was actually drawn on 6th November, 1996 and the period of limitation must, therefore, run from that date onwards.

17. Learned counsel for the assessee contended that the restraint order in respect of the fishing trawlers could not have been passed under Section 132(3) of the Act but was required to be passed under Section 132(1) of the Act.

18. The second proviso to Section 132(1) of the Act clearly lays down that where it is not possible or practicable to take possession of any valuable article or thing and remove it to a place due to its volume, weight or other physical characteristics or due to its being of a dangerous nature, then the authorised officer may serve on the owner or the person who is in possession of that article or thing an order restraining him from removing or parting or otherwise dealing with the said article or thing except with the previous permission of the authorised officer and such action shall be deemed to be a seizure of such valuable article or thing. On the other hand, Section 132(3) of the

Act comes into operation when it is not possible to seize any valuable article or thing for reasons other than those mentioned in the second proviso to sub-section (1) and by an Explanation added to Section 132(3) of the Act, it is made clear that the serving of an order under Section 132(3) of the Act shall not be deemed to be a seizure of such valuable article or thing.

19. It is obvious that the fishing trawlers could not be seized by reason of their volume or weight. Appropriately, therefore, an order could be passed by the authorised officer only of deemed seizure under Section 132(1) of the Act. Passing an order under Section 132(3) of the Act was not at all warranted given the nature of the articles, that is, fishing trawlers.

20. In ***B.K. Nowlakha v. Union of India, [1991] 192 ITR 436***, this Court held that if a seizure is effected then an order is required to be made under Section 132(5) of the Act but if there is no seizure and only an order of restraint is passed under Section 132(3) of the Act, then other consequences follow including the possibility of an extension of a

restraint order under Section 132(8A) of the Act as it stood at the relevant time. It was held that given the field of operation of the second proviso to Section 132(1) of the Act, and the far reaching adverse effect that a restraint order under Section 132(3) of the Act may have on the business of an assessee, "the power under Section 132(3) cannot be so exercised as to circumvent the provisions of Section 132(1) read with sub-section (5) thereof." The Bombay High Court reached the same conclusion in ***Mrs. Sandhya P. Naik*** and added that this had become more clear after the insertion of the Explanation to Section 132(3) of the Act to the effect that a restraint order passed thereunder does not amount to a seizure.

21. Under the circumstances, we are clearly of the view that the action for seizing the fishing trawlers ought to have been taken by the Revenue under Section 132(1) of the Act and not under Section 132(3) of the act. By merely resorting to a restraint order under Section 132(3) of the Act, and that too only upto 30th September, 1997, the Revenue could not have extended the time limit for passing an assessment order.

22. Learned counsel for the assessee submitted, that even otherwise, 14th September, 1998 cannot be the date of the last panchnama because in fact no seizure was effected on that date. We do not think it necessary to go into this question on the facts of the present case. We also do not think it necessary to discuss the provisions of Rule 112(7) of the Income Tax Rules relied upon by learned counsel. The reason for our not discussing this is because we have come to the conclusion that the search and seizure operation actually concluded on 6th November, 1996 and the events that took place on 14th September, 1998 were a make-believe intended to extend the time limit, which was not permissible.

23. The issues raised being clearly settled, and since we find no fault in the order passed by the Tribunal, in our opinion, no substantial question of law arises for consideration.

24. The appeal is dismissed.

Madan B. Lokur, J

May 02, 2007
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V.B. Gupta, J